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| | OAH 3-2000-17810-2 |

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF NATURAL RESOURCES

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| In the Matter of the Denial of Certification of the Variance Granted to Robert W. Hubbard by the City of Lakeland | **FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION** |

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on March 29-30, 2007, at Lakeland City Hall, 690 Quinnell Avenue North, Lakeland, Minnesota. A site visit took place on the evening of March 29, 2007. The OAH record closed on April 6, 2007, upon receipt of post-hearing briefs.

David P. Iverson and Kimberly Middendorf, Assistant Attorneys General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department of Natural Resources (Department or DNR).

Scott R. Strand, Esq., 1772 Eleanor Avenue, St. Paul, MN 55116, appeared for Robert W. Hubbard (Applicant).

Nicholas J. Vivian, Esq., Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, 1809 Northwestern Avenue, Suite 110, Stillwater, MN 55082, appeared for the City of Lakeland (City).

A. W. Clapp, 757 Osceola Avenue #1, St. Paul, MN 55105, appeared *pro se* for the St. Croix River Association; Andrew T. Shern, Esq., Murnane & Brandt, 30 East 7th Street, Suite 3200, St. Paul, MN 55101-4919, appeared for the Sierra Club.

## STATEMENT OF THE ISSUES

The issue in this matter is whether the DNR properly denied certification of the bluffline setback variance granted to Robert W. Hubbard by the City of Lakeland.

The Administrative Law Judge concludes the DNR properly denied certification of the variance.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Statutory and Regulatory Background

1. The St. Croix River rises from a source about 20 miles from Lake Superior near Solon Springs in northwestern Wisconsin and flows southwesterly and then southerly a total distance of 164 miles. The upper 37 miles of the St. Croix lie entirely in Wisconsin, and the remaining 127 miles form part of the boundary between Minnesota and Wisconsin.[1] The St. Croix River north of Taylors Falls and its tributary, the Namekagon, is one of the original eight rivers included in the federal Wild and Scenic River Act.[2] Federal law requires that in administering wild and scenic rivers, primary emphasis shall be given to protecting their esthetic, scenic, historic, archeologic, and scientific features.[3]

2. In 1972, Congress amended the Wild and Scenic River Act to include the lower 52-mile segment of the St. Croix River between the dam near Taylors Falls and the confluence with the Mississippi River. By statute, the National Park Service administers the upper 27 miles of this segment, from the dam near Taylors Falls to the northern city limits of Stillwater; the 25-mile segment between the northern limits of the city of Stillwater to the confluence with the Mississippi River at Prescott would be designated upon approval of an application for such designation made by the Governors of the states of Minnesota and Wisconsin.[4]

3. In 1973, the Minnesota legislature passed its own Wild and Scenic Rivers Act, permitting the Commissioner of the Department of Natural Resources to initiate the process for designating rivers within the state, and the Lower St. Croix Wild and Scenic River Act.[5] In the Lower St. Croix Wild and Scenic River Act, the Minnesota legislature made the following findings:

> The lower St. Croix River, between the dam near Taylors Falls and its confluence with the Mississippi River, constitutes a relatively undeveloped scenic and recreational asset lying close to the largest densely populated area of the state. The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of the state. The state recognizes and concurs in the inclusion of the lower St. Croix River into the federal wild and scenic rivers system by the Lower St. Croix River Act of the 92nd Congress, Public Law 92-560. The

[1] Ex. 10 at 8.
[2] Wild and Scenic River Act, Public Law 90-542, 16 U.S.C. § 1271, 1274(a)(6).
[3] 16 U.S.C. § 1281(a).
[4] Lower St. Croix River Act of 1972, Public Law 92-560 (Ex. 10 at 75), 16 U.S.C. § 1274(a)(9).
[5] Wild and Scenic Rivers Act, 1973 Minn. Laws ch. 271, § 1, Minn. Stat. § 104.31-.40 (1973), recodified in 1990 at Minn. Stat. § 103F.301-.345; Lower St. Croix Wild and Scenic River Act, 1973 Minn. Laws. Ch. 246, § 1, Minn. Stat. § 104.25 (1973), recodified in 1990 at Minn. Stat. § 103F.351.

> authorizations of the state are necessary to the preservation and administration of the lower St. Croix River as a wild and scenic river, particularly in relation to those portions of the river that are to be jointly preserved and administered as a wild and scenic river by this state and Wisconsin.[6]

4. Pursuant to the state Wild and Scenic Rivers Act, the Commissioner was directed to develop a management plan for rivers included in the system and develop standards and criteria relating to boundaries, classification, and development; and in the case of the Lower St. Croix, the Commissioner was directed to join with the Secretary of the United States Department of the Interior and the appropriate agency of the state of Wisconsin in preparing a comprehensive master plan relating to boundaries, classification, and development.[7]

5. In addition, the state legislation provides that the Commissioner shall adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to the area within the boundaries covered by the comprehensive master plan.[8] It further provides:

> (b) The guidelines and standards must be consistent with this section [103F.351], the federal Wild and Scenic Rivers Act, and the federal Lower St. Croix River Act of 1972. The standards specified in the guidelines must include:
>
> > (1) the prohibition of new residential, commercial, or industrial uses other than those that are consistent with the above mentioned acts; and
> >
> > (2) the protection of riverway lands by means of acreage, frontage, and setback requirements on development.
>
> (c) Cities, counties, and towns lying within the areas affected by the guidelines shall adopt zoning ordinances complying with the guidelines and standards within the time schedule prescribed by the commissioner.[9]

6. Finally, the state legislation provides that the Commissioner of Natural Resources, in cooperation with appropriate federal authorities and authorities of the state of Wisconsin, shall administer state lands and waters in

[6] Minn. Stat. § 103F.351, subd. 1.
[7] Minn. Stat. §§ 103F.325, subd. 1(a); 103F.351, subd. 2.
[8] Minn. Stat. § 103F.351, subd. 4(a).
[9] *Id*., subd. 4(b), (c).

conformance with this section, the federal Wild and Scenic Rivers Act, and the federal Lower St. Croix River Act of 1972.[10]

7. Based on this legislative direction, the U.S. Department of the Interior and the states of Minnesota and Wisconsin jointly prepared a Final Master Plan for the Lower St. Croix National Scenic Riverway.[11] According to the master plan, a significant portion of the lower river corridor is occupied by towns and villages. With expanding urban populations, the plan found that the need for open space was placing heavy demands on the forested areas in the region. The trend toward increasing use of the river corridor for residential purposes was thought to pose the greatest single threat to maintaining the scenic river environment.[12] The master plan recommended that the states be made primarily responsible for acquisition of lands and scenic easement interests; acquisition and development of state parks; acquisition and development of boating wayside/mini-park sites; and regulation of the use and quality of the water and alterations of the river bottom. In addition, the plan recommended that states be responsible for the preparation and adoption of minimum standards and criteria for shoreland management as authorized by their Lower St. Croix Acts, and for the enforcement of these acts in addition to other state laws applicable to the protection of the riverway. The plan further provided that counties and municipalities should be responsible for adoption, enforcement, and administration of amended shoreland and flood plain zoning ordinances.[13]

8. The master plan recommended a number of zoning guidelines, including, in incorporated areas, structure setback distances of 100 feet from the normal high water mark and 40 feet from the bluffline.[14]

9. In 1974, the DNR adopted rules for the Lower St. Croix, beginning at Minn. R. 6105.0351. The rules provide, in relevant part, that local units of government shall have 90 days to adopt ordinances in compliance with rule standards, and if they fail to do so, the commissioner may do so on behalf of the local unit of government. Local units of government are permitted to adopt ordinances that are more protective than the minimum standards and criteria contained in the rules.[15] The rules require, in urban areas, a bluffline setback of not less than 40 feet.[16]

10. The City of Lakeland adopted Washington County's Lower St. Croix River Bluffland and Shoreland Management Ordinance, in compliance with DNR

[10] *Id.*, subd. 5.
[11] Ex. 10.
[12] *Id.* at 14.
[13] Ex. 10 at 62-63.
[14] *Id.* at 69.
[15] Minn. R. 6105.0352, subp. 2. Similar rules were adopted under the Wild and Scenic Rivers Act. *See* Minn. R. 6105.0010-.0250.
[16] Minn. R. 6105.0380, subp. 5 A. (2).

rules.[17] Under DNR rules and the Lakeland Ordinance, a "substandard structure" is one that was established before the effective date of a St. Croix Riverway ordinance and is permitted within a particular zoning district, but does not meet the structure setbacks or other dimensional standards of the ordinance.[18]

11. Substandard structures shall be allowed to continue, but in no instance may the extent to which a structure violates a setback standard be increased. Any alteration or expansion of a substandard structure which increases the horizontal or vertical riverward building face shall not be allowed unless it can be demonstrated that the structure will be visually inconspicuous in summer months as viewed from the river. If a substandard structure needs replacing due to destruction, deterioration, or obsolescence, such replacement shall comply with the dimensional standards of a St. Croix Riverway ordinance.[19]

12. DNR rules provide that local authorities must conduct public hearings before any variance from dimensional standards may be approved.[20] Variances shall be granted only when there are particular hardships that make strict enforcement of a St. Croix Riverway ordinance impractical. Hardship means the proposed use of the property and associated structures in question cannot be established under the conditions allowed by a St. Croix Riverway ordinance; the plight of the landowner is due to circumstances unique to the property, not created by the landowner after May 1, 1974; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use of the property and associated structures exists under the conditions allowed by a St. Croix Riverway ordinance.[21]

13. A local authority's final decision on an application for a variance shall be forwarded to the Commissioner within ten days of such action.[22] No grant of a variance becomes effective unless and until the Commissioner has certified that the action complies with the intent of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix River acts, and the master plan adopted thereunder, and the standards and criteria contained in DNR rules.[23]

14. In 2002, the original master plan was revised with the publication of the Cooperative Management Plan for the Lower St. Croix. The Cooperative Management Plan continued to recommend a 40-foot bluffline setback in small

[17] Ex. 12; Tr. 281 (Lakeland has adopted ordinances that meet or exceed DNR standards).
[18] Minn. R. 6105.0354, subp. 30; Lakeland Ordinance § 302.01(18).
[19] Minn. R. 6105.0370, subp. 11. *See also* Lakeland Ordinance § 601.01-.04.
[20] Minn. R. 6105.0530, subp. 1; Lakeland Ordinance § 801.01.
[21] Minn. R. 6105.0520; Lakeland Ordinance § 805.01.
[22] Minn. R. 6105.0530, subp. 5.
[23] Minn. R. 6105.0540, subp. 2; Lakeland Ordinance § 802.01.

town areas as well as protection of slopes steeper than 12%. The DNR has not yet adopted new rules pursuant to the Cooperative Management Plan.[24]

**Development on the Lower St. Croix**

15. Rivers designated under the Wild and Scenic Rivers Act must be classified as "wild," "scenic," or "recreational," depending on the extent of development and accessibility along each segment. The lower 42 miles of the St. Croix, including the segment near Lakeland, is categorized as recreational.[25] In terms of land use management, Lakeland is categorized as a "small town," which means the predominant character of the landscape is large-lot, single-family residences. In terms of water use management, this area is characterized as "active social recreation."[26]

16. The bluffs in this section of the river are sandstone or limestone topped with sandy soils, and they are easily eroded. Vegetation is needed to hold those soils in place, and blufflines that have been altered tend to wash out. Blufflines are the most sensitive areas along the St. Croix due to their potential for erosion and their high visibility from the river. There are many properties along the lower St. Croix with multiple blufflines due to erosion or alteration by owners.[27]

17. As noted above, Lakeland and other municipalities along the Lower St. Croix have experienced development pressure since before passage of the Lower St. Croix Wild and Scenic River Act. Before passage of the Act, many homes were built close to blufflines and in floodplain areas. Some are quite large and are not at all screened from the river by trees or other vegetation.[28]

18. Since passage of the Act, many structures that were considered substandard because they were too close to the bluff have been removed from the bluffline (or from below the bluffline), replaced by new homes built farther back, and the bluffline areas restored to control erosion from these sites.[29]

**Hubbard Property**

19. Robert W. Hubbard's current home is at 16730 4th Street South in Lakeland. This home is located on the St. Croix River, in a floodplain development known as Lakeland Shores. When Hubbard tore down the existing home and reconstructed a new one in 1998, he sought and received a variance permitting him to build less than 100 feet from the ordinary high water mark. The old structure, which was removed, had been 54 feet from the ordinary high water

[24] Tr. 374; Ex. 11 at 62.
[25] *See* Minn. R. 6105.0060, subp. 4.
[26] Ex. 11 at 13, 24-38.
[27] Tr. 296, 352; Ex. 10 at 29-20.
[28] *See, e.g.*, Ex. 41.
[29] Tr. 432-34.

mark; he was permitted to build the new structure 71 feet back from the ordinary high water mark after analysis showed there was insufficient room to build the structure at the top of the bluff. The DNR certified approval of this variance.[30]

20. Hubbard began working with architect Ron Brenner on plans to remodel his home in Lakeland Shores. He also looked at other properties on the river that might be suitable for a new home.[31] In April 2006, he purchased the property at 1175 Quinlan Avenue North in Lakeland. When he purchased the property, Hubbard was familiar with the zoning requirements and knew that he would need a variance to build a new home in a bluffline setback area.[32]

21. The property at 1175 Quinlan Avenue North consists of 3.8 acres of land, with approximately 200 feet of frontage along the lower St. Croix River. The property is heavily forested with pine, cedar, and oak trees. The bluff is approximately 60 feet above the beach. From the bluff extending back to Quinlan Avenue (a distance of about 630 feet), the land is essentially flat. There are no obstructions to building anywhere on the lot.[33]

22. At some point between 1902 and 1908, the property was part of a larger parcel owned by the Automobile Club of St. Paul. At that time a roadway was graded at an angle down the bluff to the beach, where there was a clubhouse. The existing house on the property was built in 1945. It is set on top of the original bluff, part of which was excavated to create a partial basement and tuck-under garage that faces the river, at the point where the road came up and met the house.[34] A retaining wall and steps were installed south of the house to permit access to the garage area below the bluffline.[35] An above-grade cement slab patio extends from the structure toward the river; it is built on top of a cement block foundation that has significantly deteriorated and shows signs of structural damage.[36]

23. Because the bluff is so steep, it is not clear how much of the beach can be seen from inside the existing structure; but the beach is clearly visible from the patio.[37] The beach would probably be visible from the second floor of the proposed residence. From about 40 feet behind the bluff, there is a magnificent view of the river, but the beach is not visible.[38]

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[30] Ex. 9 at 3.
[31] Tr. 172-73.
[32] Tr. 212.
[33] Ex. 15; Ex. 7 at 7; Ex. 28.
[34] Ex. 7 at 1. The old road is reflected on Ex. 21 as the beige area on the bluff running roughly parallel to the river; and on Ex. 51 as the lighter gray area on the bluff.
[35] Ex. 26.
[36] Ex. 25; Tr. 83.
[37] Ex. 27.
[38] The site visit did not include the interior of the existing home.

**Determination of the Bluffline**

24. The previous owner of the property had a survey performed in 2002, when he attempted unsuccessfully to subdivide it. The survey done at that time shows two roughly parallel blufflines; one runs along the top of the bluff through the middle of the existing house, and the other runs closer to the river just east of the old road.[39]

25. In March 2006, shortly before Hubbard closed on the property, he hired Cornerstone Land Surveying to perform a field survey. Hubbard instructed the surveyor, Dan Thurmes, to locate the boundaries, structures, the bluffline, and some of the trees.[40] On March 30, 2006, Thurmes sent a field crew to the site to collect the necessary data. Hubbard was at the site with the field crew. In the area just south of the house, the field crew staked the bluffline at the top of the steps that lead down to the garage. On the north side of the house, the field crew staked another point northwest of the northwest corner of the house (basically behind the house on the northwest side). After they placed this stake, Hubbard indicated to them that he had some concerns with were they had located the bluffline. Either Hubbard or the crew called Thurmes to the site so that he could determine personally where the line should be placed.[41]

26. When Thurmes arrived, Hubbard indicated he was not in favor of the line determined by the field crew. He questioned whether the line was correct and thought it looked "weird." Thurmes agreed that placement of the stakes should be re-examined. He then determined that the bluffline should be staked from the corner of the retaining wall about 30 feet southeast of the steps, across the old roadway, around the existing patio and retaining wall, and back up to a ridge north of the house.[42] Thus, the field crew staked a line running through the existing house and coming out at the back; Thurmes determined the line should run instead around all of the improvements in the front of the house facing the river. The survey documents produced based on these measurements show the bluffline as determined by Thurmes, running around the front of the house and crossing several contour lines north and south of the existing patio.[43]

27. The Lakeland Ordinance defining the bluffline reads as follows:

> "Bluffline" means a line along the top of a slope connecting the points at which the slop, proceeding away from the river or

[39] Ex. 60. The surveyor apparently located these blufflines visually, without taking slope measurements. *See* Tr. 446-49.
[40] The variance process requires submission of a survey showing the property location, boundaries, dimensions, elevations, blufflines, utility and roadway corridors, the ordinary high water mark, floodway, and floodplain, as well as the location of existing and proposed structures and setback dimensions. Lakeland Ordinance § 806.01.
[41] Tr. 34-35, 47, 61-62.
[42] *Id*.
[43] Ex. 15; attachment to Ex. 13. *See also* Exs. 16, 17, and 19 (site plan with overlay of proposed structure).

> adjoining watershed channel, becomes less than 12% and it only includes slopes greater than 12% visible from the river or any water course tributary to a river. The location of a bluffline for any particular property shall be certified by a registered land surveyor or the zoning administrator. More than one bluffline may be encountered proceeding away from the river or adjoining watershed channel. All setbacks required herein shall be applicable to each bluffline.[44]

28. Thurmes was aware of this definition when he made the survey drawings; he chose instead to locate what he believed to be the "original" bluffline, without regard to the 12% rule. He did not believe it made sense to use the 12% rule.[45]

29. The DNR definition of a bluffline reads as follows:

> "Bluffline" means a line along the top of a slope connecting the points at which the slope, proceeding away from the river or adjoining watershed channel, becomes less than 12 percent; except that bluffline does not include the tops of slopes not visible from the river assuming no vegetation cover or the tops of slopes associated with minor undulations or roadside ditches, provided that the construction and presence of any proposed structure near the tops of such slopes will not cause erosion and that the structure will not be visible from the river. The location of the bluffline for any particular property shall be certified by a licensed land surveyor or the local authority. More than one bluffline may be encountered proceeding away from the river or adjoining watershed channel. All setbacks required herein shall be applicable to each bluffline.[46]

30. There is no evidence that Thurmes was aware of or relied upon the DNR bluffline definition when he produced the survey drawings.[47] At the hearing, however, he maintained that the house itself and the improvements on the river side of the house constituted "minor undulations" within the meaning of the DNR rule that justified locating the bluffline around them.[48] Thurmes agrees that such a bluffline wrapped around the front of the house is visible from the river.[49]

31. In the course of discovery in this matter, the DNR obtained the survey data used by Cornerstone Land Surveyors. Using this data, the DNR determined a bluffline using the 12% slope rule. The bluffline generated by this data differs substantially from that depicted on Hubbard's site plan. From the

[44] Lakeland Ordinance § 302.01(3).
[45] Tr. 48-50.
[46] Minn. R. 6105.0354, subp. 5.
[47] Tr. 40.
[48] Tr. 53.
[49] Tr. 71-72.

south it runs along the top of the retaining wall to the steps, down the steps across the front of the garage, then north along the concrete retaining wall supporting the patio slab. Using the DNR-determined bluffline, more of the proposed new structure is located in the setback area than is depicted on Hubbard's site plan.[50]

32. A survey depicting a bluffline that crosses contour lines does not comply with either the DNR rule or with the Lakeland ordinance, because it is not drawn along the top of the slope. The DNR correctly concluded that the existing structure is not a "minor undulation" in the landscape because the construction of a proposed structure near the top of such a slope would be visible from the river.[51]

**Hubbard Site Plan**

33. Hubbard consulted Brenner about how to incorporate the existing structure into a new home. He gave no serious consideration to removing the existing structure and building entirely behind the setback area.[52] In Hubbard's view, the existing home was located on the most valuable part of the property, and having a "connection" to the river meant being able to visually monitor the beach.[53]

34. After arriving at a general plan, Hubbard and Brenner put together a package describing the project. Using the survey and bluffline determinations made by Thurmes, they developed preliminary site plans calling for construction of a large home using the footprint of the existing home as a north "wing"; behind this wing the house and attached garage would extend west about 150 feet, with a southern wing running south about 130 feet. A turn-around area and sport court would be located in the area between the west and south wings. West of the turn-around area, the plans depict placement of three septic tanks and a large drainfield.[54] The new home would have approximately 10,000 finished square feet on the first and second levels; there would be additional finished square footage in the basement/walkout area (about 2,200 square feet), and there are large areas of storage space (about 1,600 square feet) and unfinished space (about 2,500 square feet) in the basement and above the garage (about 1,600 square feet).[55]

35. The plans also depict a new patio off the north wing, running up to the bluffline. New landscape stairs would be built down the bluff from this patio, and a tram lift would run just north of the stairs from the patio to the beach. Most of the new structure (not including the patios or a stairway adjacent to the north

[50] Exs. 21, 51.
[51] Tr. 301, 303-06.
[52] Tr. 91, 200, 204-05.
[53] Tr. 89, 200, 204-05 (pulling the house down is not an option).
[54] Exs. 18, 19.
[55] Ex. 65.

patio) is located behind the 40-foot setback line as determined by Thurmes. Brenner calculated that the plan reduces the amount of footprint structure in the setback area from 1,136 square feet for the existing cabin to 956 square feet for the proposed new home.[56]

36. If the DNR-determined bluffline is used, about 2,000 square feet of the proposed new home is located in the setback area. If patios are included as structure, another 2,700 square feet is located in the setback area.[57]

37. Many trees would have to be removed from this lot to build the home described in the plans—to excavate the basement and to construct the house, patios, driveway, turnaround area, and septic system.[58]

**Variance Application**

38. Hubbard contacted the City and the DNR to solicit feedback about the plans. The City informed him that the plans would require three variances: bluffline setback (40 feet), sideyard setback (20 feet), and height (35 foot maximum).[59] The plans called for a 9 to 20-foot bluffline setback; a 10-foot sideyard setback; and a structure height of 42 feet, depending on how height is measured.[60] Molly Shodeen, area hydrologist for the DNR, advised Hubbard that if he tore down a substandard structure, he would have to look at moving the new structure back to meet the bluffline setback. If he remodeled a substandard structure, different ordinance provisions would apply. Hubbard advised her that he was not going to move the house back.[61]

39. On July 14, 2006, Hubbard submitted an application for variances to the bluffline setback, the sideyard setback, and either a variance or clarification as to whether a variance was needed with regard to the maximum structure height. Attached to the application is a hardship statement, drafted with the assistance of Hubbard's architect and attorneys, providing as follows:

> We see hardship for all requested variances as the following:
>
> The requested variances/clarifications are required in order to construct a portion of the new structure within the footprint area of the existing structure.
>
> Utilizing the footprint of the existing structure and adding square footage on an upper floor level significantly reduces overall footprint size and reduces excavation, grading and tree removal in the

[56] Tr. 94, 147; Exs. 13, 17, 19, 65.
[57] Tr. 390. It appears that the City defines patios as structure, but the DNR rules do not. *See* Ex. 7 at 59; Tr. 460-61.
[58] Tr. 137-41; Exs. 22, 64 at 3-4.
[59] Tr. 176.
[60] Ex. 13.
[61] Tr. 405-06.

vicinity of the bluff line area. This reduces the overall impact on the natural environment.

> If variance(s) are not granted, the displaced square footage will need to be added to the main level footprint, thereby increasing overall impervious surface coverage, increasing house width along the bluff line and increasing tree removal requirements.
>
> Alternatively if the variance is not granted, the existing structure could be remodeled thus maintaining the current undesirable encroachments in the most sensitive areas of the bluff line setback.[62]

40. The statement attached to the application also contains additional information concerning the square footage of structure footprint in the setback area for the existing and proposed home, the linear structure setbacks for the existing and proposed home, and statements concerning elimination of the old retaining walls, stabilization of the bluff line, and the visual inconspicuousness of the new house during summer months. Attached to the application is a diagram of the existing site, depicting the bluffline as determined by Thurmes.[63]

41. The proposed project calls for removal of the existing structure and replacement with a new structure on the same footprint. The issue of whether the new house would be visually inconspicuous from the river would be relevant if, for example, Hubbard proposed to remodel the existing structure. In his application for the required variances, Hubbard asserted that because the bluff was heavily wooded, the new house would be visually inconspicuous, and that together with other improvements he would make to control erosion, the building of a new home on the old footprint would result in a "net improvement to the site and a net add for the [C]ity of Lakeland." [64]

**Planning Commission Proceedings**

42. On August 15, 2006, the Sierra Club wrote to the Lakeland Planning Commission stating that Hubbard should be required to provide a slope stabilization plan and should submit a photographic simulation of the new home in morning light.[65]

43. On August 29, 2006, the Sierra Club wrote to the Lakeland Planning Commission and City Council urging denial of the requested variances. The Sierra Club argued that because Lakeland was experiencing a surge in new riverfront development and redevelopment, granting these variances would open

[62] Ex. 13; Tr. 96, 177.
[63] Ex. 13.
[64] *See* Minn. R. 6105.0370, subp. 11(c).
[65] Ex. 42.

the door for similar resource degradation in other locations on the river, including adjacent properties with nearly identical characteristics.[66]

44. On August 31, 2006, Molly Shodeen of the DNR provided written comments to the City for the public hearing scheduled for September 6, 2006. She stated that the bluffline and sideyard setback variances should be denied because there was adequate space to fully meet setbacks on the property; in addition, she believed the project exceeded the DNR height limitation. She further stated that the plans reflected that there would be additional grading within the setback area to further expose a walkout level, which she believed was inconsistent with Lakeland Ordinance § 402.02.

45. Furthermore, Shodeen indicated that the DNR did not agree with the location of the bluffline as shown on the plans and recommended that Hubbard be required to provide a drawing with shading showing slopes in excess of 12%. In the event that Hubbard decided to remodel the existing structure, she pointed out that the project would require different variances from Lakeland Ordinances precluding raising the elevation or roofline of substandard structures, but that DNR rules would permit horizontal or vertical expansion of substandard structures as long as the structure would be visually inconspicuous in summer months as viewed from the river and the extent of the structure violating a setback were not increased. She also asked that Hubbard be required to provide a computer simulation of the home to assess visibility from the river.[67]

46. On September 6, 2006, the public hearing was held before the Lakeland Planning Commission. On a vote of 4-2, the Planning Commission recommended that the City Council deny the variance applications for the bluffline and sideyard setbacks on the basis that there was no showing of hardship. The Planning Commission passed a motion directing City staff to provide feedback on best management practices for measurement of height.[68]

47. On September 14, 2006, Shodeen wrote to the City Council with information about other projects discussed at the Planning Commisson meeting.

48. One of the projects was the home of Keith Radtke. Radtke had proposed tearing down an existing structure and reconstructing on the same site, located approximately 75 feet back from the main bluff in an area where the setback requirement was 40 feet. At some point in time, manmade blufflines had been created when the owner had excavated a walkout level, digging and grading a narrow 75-foot-long trench perpendicular to the bluffline. The City had granted a variance for setbacks to these perpendicular blufflines, but denied the owner permission to further excavate the walkout level. The DNR had certified approval of the variance on the basis that the perpendicular blufflines were

[66] Ex. 43.
[67] Ex. 5.
[68] Ex. 7 at 2-13.

arguably "minor undulations" excluded from the definition of a bluffline.[69] In addition, the DNR required Radtke to prepare a vegetation plan to provide long-term screening of the structure from the river.[70] The Radtke project is not comparable to Hubbard's because the replacement structure was set back almost twice as far as the required setback from the bluffline parallel to the river.

49. Another project discussed at the Planning Commission meeting was the home of Brian Zeller, the current mayor of Lakeland. He received a variance to construct a garage in an area not visible from the river, in which a gully perpendicular to the river had created a "wraparound" bluff. In addition, there were road setbacks and a septic system behind the house that constrained where he could construct a garage. Because this bluffline was not visible from the river, the DNR certified approval of this variance.[71] The Zeller project is not comparable to Hubbard's because there are no septic or road constraints to building on his property and all blufflines are visible from the river.

50. In the case of the DeRose home, the City permitted the owner to demolish and rebuild an existing structure 22 feet from the bluffline. The DNR eventually certified approval of the variance because the lot size was small and an existing septic system and utility easement precluded moving the home farther back.[72] This project is not comparable to Hubbard's because there are no septic or utility easement constraints that would preclude building the new home behind the bluffline setback.

51. In the case involving the Davies home, Denmark Township granted a variance to permit the owners to tear down two substandard structures and rebuild a single large home partially at the bluffline. The owners contended that the planned home could not be moved farther back because a buried 36-inch concrete drainage culvert, installed in the 1960s to control erosion and drainage problems, limited the space available to install a septic drainfield behind the home. The Washington County Board of Adjustment and Appeals agreed, permitting a 0-foot setback because of the existing drainage pipe. The DNR denied certification of the variance, maintaining that the buried culvert did not constitute a sufficient hardship that would preclude moving the house farther back, considering that the property altogether was more than 40 acres. The owner appealed the DNR's refusal to certify approval, and the matter was resolved when the homeowner agreed to a bluffline setback of 13.3 feet, as opposed to the 0-foot setback approved by Washington County.[73] This project is not comparable to Hubbard's because there is no impediment such as a buried drainage pipe that would preclude building the new home behind the bluffline setback.

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[69] As noted above, the DNR definition of bluffline does not include slopes associated with minor undulations that are not visible from the river. *See* Minn. R. 6105.0354, subp. 5.
[70] Exs. 6, 46-47, 62. *See also* Tr. 299-300.
[71] Ex. 6. *See also* Tr. 306-07, 485.
[72] Exs. 6, 9; Tr. at 435.
[73] Ex. 48.

**City Council Meeting**

52. The Lakeland City Council met on September 19, 2006. The minutes reflect that the Council re-opened the public hearing record to include information from the Middle St. Croix Watershed Management Organization, which had found Hubbard's plans for managing runoff to comply with most standards of the Watershed Management Plan.[74] With regard to the issue whether the bluffline depicted on Hubbard's plan was accurate, the City Attorney advised the City Council that if the Council were to decide the location of the bluffline was unclear or not factually developed, it could require Hubbard, City staff, or the DNR to provide additional information; if, on the other hand, the City Council was satisfied with the location depicted on the plans, it could go forward.[75] Hubbard responded that it did not particularly matter where the bluffline was, because he could use the existing structure and build behind it.[76]

53. At the conclusion of the meeting the City Council passed a motion directing the City Attorney to draft a resolution granting the variance to the bluffline setback for the following reasons:

> [A]bility to reuse the existing footprint presents [an] opportunity to continue utilizing the property as a living unit without further encroaching or creating more harm to the River environment, (2) applicant has met [the] test of [the] Ordinance demonstrating the structure/home is behind the bluffline as determined by his professional staff, and (3) applicant has demonstrated significant stewardship efforts to preserve or better protect the River by virtue of structural improvements as proposed in [the] plan submitted; hardship is [the] continued deterioration of the property which will result in additional harm to the river.[77]

54. The City Council gave similar direction to the City Attorney to draft resolutions approving the sideyard setback and height variances.[78]

55. On October 17, 2006, the City Council adopted, on a vote of 3-1, a resolution granting the application for variances to the bluffline setback, sideyard setback, and height requirements. The resolution found hardship existed because:

> (1) The lot can support single family residential development and the proposed development is fundamentally reasonable.

[74] Ex. 7 at 57; Ex. 40.
[75] Ex. 7 at 57.
[76] *Id*. at 58.
[77] Ex. 7 at 58-59.
[78] *Id*. at 59-62.

(2) Lot impervious surface requirements are met by the development as proposed.

(3) The existing grade and topography of the lot can be adjusted under the supervision and direction of the City Engineer, as part of this development to better conform to the ordinance requirement for the St.Croix River District overlay ordinance. The City Engineer and the City Clerk will ensure compliance with the City Code of Ordinances. Violation of City Ordinances will be grounds for stoppage of the development.

(4) The lot has multiple grades and bluff lines to contend with from a development standpoint and is unique in its topography and layout affecting building [siting] and location.

(5) The proposed development will allow the bluff line to be stabilized and improved upon from its existing state.

(6) The development as proposed will be visually inconspicuous from the St. Croix River during summer months.

(7) The development as proposed does not increase the level of non-conformity with the ordinances relative to the existing structure.[79]

56. Hubbard did not provide to the City Council either the photographic simulation of the new home in morning light, as requested by the Sierra Club, or a computer simulation to assess visibility from the river, as requested by the DNR. He did provide some drawings of a three-dimensional model of the new house, placing "trees that were available" into the program to produce a number of views from the river. These drawings were made available to the City Council but were not included in the record.[80]

57. During the contested case hearing, Hubbard presented a photographic simulation based on the three-dimensional model and several photographs Hubbard took of the property in afternoon light.[81] Because the home would face east, there would be light on the façade in the morning hours, and as the sun moves to the west, the shadows would make the house appear darker and blacker.[82] The photographs depict the simulated appearance of the house when the sun is straight south or to the west of the trees.[83] Based on

[79] Ex. 7 at 19.
[80] Tr. 105-06.
[81] Tr. 106-113, 148-49.
[82] Tr. 119-20, 148.
[83] Exs. 33-36; Tr. 148-49.

"guesswork" as to which trees would have to be removed to build the house, some of the trees in the photographs were masked out.[84]

58. Molly Shodeen of the DNR disagreed that the proposed house would be as inconspicuous as described. There is a visible gap in the tree line in front of the existing structure, and she believes that if a two-story structure were placed there, the second story would "pop up" and be much more visible than the existing structure.[85]

59. The Sierra Club also disputed Hubbard's assertions concerning the visibility of the proposed home. Based largely on the use of different assumptions as to how many trees would have to be removed to construct the proposed home, the Sierra Club believes it would be more visually conspicuous than the existing structure.[86]

60. On November 2, 2006, the City of Lakeland notified the DNR of its decision and sought a certificate of approval or notice of nonapproval pursuant to Minn. R. 6105.0540.[87]

61. On November 20, 2006, the St. Croix River Association sent a letter to the DNR Commissioner urging denial of certification of the variances.[88]

62. On November 22, 2006, the St. Croix Scenic Coalition sent a letter to the DNR Commissioner also urging denial of certification.[89]

63. On November 29, 2006, the DNR issued its notice of nonapproval of the variance decision. The DNR concluded the City had not adequately justified the bluffline variance and failed to address the question of why the owner could not move the house behind the setback area. Concluding it had no authority to approve or disapprove the sideyard setback because this was a local requirement only, the DNR did not address this variance. In addition, because the city's ordinance on height restriction was more restrictive than the DNR rule, the DNR did not approve or disapprove the height variance. The notice informed Hubbard and the City that they had 30 days from mailing of the notice to demand a public hearing.[90]

64. The City of Lakeland has never before granted a bluffline setback variance when there is no impediment to building a new structure in compliance with its ordinance.[91] Although the DNR has certified approval of numerous variances to bluffline setback requirements, it has never certified approval of a

[84] Tr. 115-24.
[85] Exs. 22, 56-57; Tr. 426-29, 438-39.
[86] Ex. 64; Tr. 518.
[87] Ex. 7.
[88] Ex. 49.
[89] Ex. 50.
[90] Ex. 8.
[91] Tr. 263 (Morris does not recall any variance granted under these circumstances).

variance without requiring the replacement structure to be moved back as far as possible from the bluffline.[92]

**Procedural Findings**

65. On December 21, 2006, the City of Lakeland demanded a hearing.[93]

66. On December 22, 2006, Hubbard demanded a contested case hearing under the Administrative Procedure Act, pursuant to Minn. R. 6105.0230, subp. 3(E). The demand for hearing stated "Because building entirely behind the 40-foot bluffland setback line would eliminate any reasonable river view, the Hubbards sought a variance from the City." He argued that courts had interpreted the hardship standard under Minn. Stat. § 462.357, subd. 6, more leniently than did the DNR. He also argued that 2004 amendments to Minn. Stat. § 462.357, subd. 1e, allowed for the replacement of a non-conformity. He did not argue that the DNR lacked statutory authority to deny certification of the variance granted by the City.[94]

67. On January 23, 2007, the Commissioner issued a Notice and Order for Prehearing Conference and Order for Hearing (Notice and Order for Hearing). The Notice and Order for Hearing scheduled a prehearing conference to take place on February 14, 2007, at the Office of Administrative Hearings.

68. January 31, 2007, and February 7, 2007, the DNR published the Notice and Order for Hearing in the Oakdale/Lake Elmo Review.[95]

69. On February 12, 2007, the DNR published the Notice and Order for Hearing in the *EQB Monitor*.[96]

70. On February 14, 2007, the prehearing conference took place as scheduled. The parties agreed on various procedural deadlines, and the hearing was scheduled to take place on March 29-30, 2007.[97]

71. On February 14, 2007, the St. Croix River Association filed a timely petition to intervene as a party.

72. On February 21, 2007, the Sierra Club filed a timely petition to intervene as a party.

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[92] *See* Ex. 9; Tr. 436-37.
[93] Ex. 3.
[94] Ex. 2.
[95] Ex. 1.
[96] Ex. 4.
[97] First Prehearing Order (Feb. 15, 2007).

73. Hubbard and the City objected to the petitions for intervention. After submission of briefs, the Administrative Law Judge granted the petitions for intervention.[98]

74. The hearing took place as scheduled on March 29-30, 2007.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have authority to consider this matter pursuant to Minn. Stat. §§ 103F.351; 103G.311, subd. 2; and 14.57; and Minn. R. 6105.0540, subp. 3(E)(1).

2. All relevant procedural requirements of law and rule have been fulfilled.

3. The Applicant's property is subject to the St. Croix Riverway Ordinance of the City of Lakeland, the Lower St. Croix Wild and Scenic River Act, and the rules adopted pursuant to Minn. Stat. § 103F.351.

4. A substandard structure is any structure established before the effective date of a Saint Croix Riverway ordinance which is permitted within a particular zoning district but does not meet the structure setbacks or other dimensional standards of the ordinance.[99]

5. The minimum setback applicable to all structures in urban districts is not less than 40 feet from a bluffline.[100]

6. The existing structure on the Applicant's property is a substandard structure because it was built in 1945, and it does not meet the dimensional standards of the ordinance because it is less than 40 feet from the bluffline.

7. If a substandard structure needs replacing due to destruction, deterioration, or obsolescence, such replacement shall comply with the dimensional standards of a Saint Croix Riverway ordinance.[101]

8. A variance is any modification or variation of the dimensional standards of a Saint Croix Riverway ordinance where it is determined that, because of hardships, strict enforcement of the ordinance is impractical.[102]

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[98] Order on Petitions for Intervention (Mar. 7, 2007).
[99] Minn. R. 6105.0354, subp. 30.
[100] Minn. R. 6105.0380, subp. 5 A. (2).
[101] Minn. R. 6105.0370, subp. 11 D.
[102] Minn. R. 6105.0354, subp. 32.

9. Variances shall only be granted where there are particular hardships which make the strict enforcement of a Saint Croix Riverway ordinance impractical. Hardship means the proposed use of the property and associated structures in question cannot be established under the conditions allowed by a Saint Croix Riverway ordinance; the plight of the landowner is due to circumstances unique to the property, not created by the landowner after May 1, 1974; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property and associated structures exists under the conditions allowed by a Saint Croix Riverway ordinance.[103]

10. The Applicant has failed to show that strict enforcement of the ordinance is impractical because of hardships.

11. The fact that the existing structure is centered on the original bluffline and sits below it in part does not support a finding of hardship when DNR rules and Lakeland Ordinances require that if such structures are replaced, the replacement structures meet setback requirements.

12. The Commissioner shall, no later than 30 days after receiving notice of the final decision of a local authority, communicate to the local authority either certification or approval, with or without conditions, or notice of nonapproval.[104]

13. The Commissioner properly issued a notice of nonapproval of the bluffline setback variance granted to the Applicant by the City of Lakeland.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

## RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner AFFIRM the DNR's denial of certification of the bluffline setback variance granted to Robert W. Hubbard by the City of Lakeland.

Dated: May 8, 2007

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

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[103] Minn. R. 6105.0520.
[104] Minn. R. 6105.0540, subp. 3 C.

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Mark Holsten, Commissioner of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

Hubbard and the City have made a host of legal arguments as to why the City's action was appropriate, most of which are premised on the assertion that the DNR has no authority to "unilaterally veto" a local decision through the certification process. They contend the City must be the final decision-maker, that it has broad discretion to determine whether a bluffline setback variance should be issued, and that its decisions are entitled to deference through application of the standard of review normally applied to final municipal decisions on variance issues under the Minnesota Municipal Planning Act, Minn. Stat. § 462.357. The Administrative Law Judge has concluded that these arguments are legally unfounded.

### Statutory Authority for Certification Process

In *County of Pine v. State Department of Natural Resources*,[105] the Commissioner of Natural Resources designated the Kettle River in Pine County as the first of the state's wild and scenic rivers and adopted a management plan containing standards and criteria to be incorporated into local ordinances. Pine County refused to adopt a wild and scenic river ordinance for the Kettle River within the allotted time. The Commissioner then adopted an ordinance on behalf

[105] 280 N.W.2d 625 (Minn. 1979).

of the county, as required by the statute. The Kettle River ordinance adopted by the Commissioner identified the permitted, nonpermitted, and conditional uses for lands; allowed nonconforming uses to continue; adopted minimum lot size and setback requirements from the ordinary high-water mark and bluffline; permitted the County to grant variances when strict enforcement of the ordinance would cause unnecessary hardship; and provided that variances were subject to approval by the Commissioner of the DNR.[106]

Pine County and a landowner in the wild river district challenged the ordinance, arguing in relevant part that the ordinance was not authorized by the Wild and Scenic Rivers Act. They also argued that the ordinance exceeded the police power of the state and that enforcement would constitute an impermissible taking of their property.

After rejecting the constitutional claims, the Supreme Court addressed the argument that the Kettle River ordinance was not authorized by the Wild and Scenic Rivers Act. The Court held that the Act specifically permits the Commissioner to promulgate minimum standards and that the DNR did not lack authority to develop an ordinance that included concepts, such as the bluffline, that were not specifically included in the enabling legislation, because "[e]nabling legislation cannot possibly cover every detail, or the need for administrative regulation would disappear." The Supreme Court concluded:

> We hold the district court's decision that the ordinance 'bear[s] no demonstrable and reasonable relationship to legislative objectives' unfounded. *The Kettle River ordinance contains a reasonable set of regulations, completely within the mandate granted to the DNR by the enabling legislation.*[107]

Despite the clarity of the Supreme Court's holding that the DNR had authority to adopt rules pursuant to the Wild and Scenic River Act, which are virtually identical (with regard to certification of variances) to those adopted pursuant to the Lower St. Croix River Act,[108] Hubbard and the City argue that the DNR lacked statutory authority to adopt a rule requiring the DNR to certify approval or give notice of nonapproval of a variance decision made by a municipality. They contend that their specific challenge to the certification process was not raised or decided in *County of Pine v. State DNR*.

Specifically, they argue that neither the Wild and Scenic River Act, Minn. Stat. § 103F.301-.345, nor the Lower St. Croix River Act, Minn. Stat. § 103F.351, provide the DNR with "unilateral veto authority over local decisions in individual cases, or the authority to make de novo decisions, ignoring the record developed at the local level." Because the local decision should be considered a final decision, they contend the DNR's role should be limited to what it could obtain by

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[106] *Id.*, 280 N.W.2d at 628.
[107] *Id.*, 280 N.W.2d at 631 (emphasis added).
[108] *See* Minn. R. 6105.0230, subp. 1; Minn. R. 6105.0540, subp. 1.

taking an appeal to district court under Minn., Stat. § 394.27, subd. 9 (appeals of decisions under a county zoning ordinance) or by a petition for a writ of certiorari to the court of appeals under Minn. Stat. § 606.01 (appeals of municipal decisions). Because the DNR had no authority to adopt the certification rule, they argue the DNR has no jurisdiction to consider this matter at all.[109]

The Wild and Scenic River Act provides that the Commissioner shall administer the wild and scenic rivers system and shall conduct studies, develop criteria for classification and designation of rivers, designate rivers for inclusion within the system, manage the components of the system, and adopt rules to manage and administer the system.[110] The act requires that local governments adopt or amend their ordinances "to the extent necessary to comply with the standards and criteria of the commissioner and the management plan;" it permits the Commissioner to adopt an ordinance on behalf of the local government if it fails to do so within six months; and provides that the Commissioner "shall assist local governments in the preparation, implementation, and enforcement of the ordinances."[111] The Lower St. Croix Wild and Scenic River Act similarly provides that the Commissioner (in consultation with the federal government and the state of Wisconsin) shall develop and prepare a comprehensive master plan relating to boundaries, classification, and development.[112] The DNR is specifically charged with the responsibility to adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to the area within the comprehensive master plan; the guidelines and standards must be consistent with this section, the federal Wild and Scenic Rivers Act, and the federal Lower St. Croix River Act of 1972. The standards specified in the guidelines must include: (1) the prohibition of new residential, commercial, or industrial uses other than those that are consistent with the above mentioned acts; and (2) the protection of riverway lands by means of acreage, frontage, and setback requirements on development.[113]

The certification rule adopted by the Commissioner provides that, in order to ensure that the standards and criteria reflected in the DNR rules are not nullified by "unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions, a review and certification procedure is hereby established for certain land use decisions," including actions to adopt or amend a St. Croix Riverway ordinance, rezoning of particular tracts of land, and granting a variance from the provisions of a St. Croix Riverway

[109] Despite these arguments, and despite the fact that the Lakeland Ordinance itself requires certification by the Commissioner (§ 802.01), Hubbard and the City acknowledge that the DNR has already made a decision in this case and that DNR rules legitimately prescribe that appeals are to be made via a contested case proceeding under the Administrative Procedure Act. They agree that the Administrative Law Judge's role here is to make a recommendation to the DNR Commissioner, who will make the final decision. *See* Tr. 25.
[110] Minn. Stat. § 103F.321, subd. 1.
[111] *Id*.,§ 103F.335, subd. 1(a)-(c).
[112] *Id*., § 103F.351, subd. 2.
[113] *Id*., § 103F.351, subd. 4.

ordinance that relates to the dimensional standards and criteria of part 6105.0380.[114]

Hubbard points out that, during the DNR's rulemaking process, one municipality argued that the certification rule was unauthorized. The Administrative Law Judge concludes that the Commissioner properly rejected this argument at the time. The certification rule is completely within the broad legislative mandate granted to the DNR to assure that minimum standards are adopted and enforced consistently by local governments. The DNR properly has jurisdiction over this matter.

Finally, Hubbard contends that the DNR's failure to adopt certification rules under other statutes, such as the shoreline development statute[115] or the floodplain management statute,[116] support his argument that the DNR lacked authority to do so here. Those statutes are structured differently, however, and they provide that after DNR approval of the shoreland or floodplain ordinance, municipalities and counties are charged with enforcing them under Minn. Stat. §§ 394.37, 462.362, or both.[117] Under the Mississippi Headwaters Planning and Management Act, the statute provides authority to the Mississippi Headwaters Board (not the DNR) to certify approval or disapproval of variances.[118] This does not mean that the DNR lacks authority under Minn. Stat. § 103F.351 to provide for certification through adoption of a rule.

**Municipal Planning Act**

The City advances the corollary argument that because the DNR has no authority to certify approval or disapproval, its action must be accorded the deference typically granted to the final decisions of municipalities concerning variances under the Municipal Planning Act, Minn. Stat. § 462.357, subd. 6. In addition, the City contends that its decision must be reviewed on the basis of the record made before the Planning Commission and City Council and that none of the additional evidence developed in the course of the hearing in this matter should be considered.

The power to engage in zoning is a police power of the state. In 1965 the state gave cities the power to develop comprehensive municipal plans and land use plans in Minn. Stat. §§ 462.353 and 462.355, and it authorized municipalities to implement those plans through zoning ordinances.[119] Lakeland has its own zoning ordinance, separate and apart from the St. Croix Riverway Ordinance,

[114] Minn. R. 6105.0540, subp. 1.
[115] Minn. Stat. § 103F.211.
[116] Minn. Stat. § 103F.101-.165.
[117] *See* Minn. Stat. § 103F.221, subd. 2(c);103F.121, subd. 3(d).
[118] Minn. Stat. § 103F.361.
[119] Minn. Stat. § 462.357, subd. 1.

which was adopted pursuant to this authority.[120] The statute authorizes municipalities to hear requests for variances from the strict requirements of these ordinances based on hardship.[121] When those decisions are appealed, whether (previously) to the district court or (currently) to the court of appeals, the decision is generally reviewed based on the record made by the municipality, which is the final decision-maker. Municipalities are accorded "broad discretion" to manage their own zoning ordinances and to grant or deny variances. On appeal, the courts apply the standard of review applicable to final agency decisions.[122]

Under the DNR rules, a different procedure is followed. Local authorities must notify the Commissioner of their final decisions on variances within ten days. The Commissioner shall, no later than 30 days after receiving notice of the final decision, communicate to the local authority either certification of approval, with or without conditions, or notice of nonapproval.[123] No such action becomes effective unless and until the Commissioner has certified that the action complies with the intent of the National Wild and Scenic Rivers Act, the federal and state Lower Saint Croix River acts and the master plan adopted thereunder, and these standards and criteria (i.e., the DNR rules). In determining the acceptability of the proposed action, the items in part 6105.0530, subpart 4, shall be considered.[124] In the case of nonapproval, either the local authority or the applicant may, within 30 days file with the commissioner a demand for hearing. If a hearing is demanded, it shall be held in the appropriate local community, and notice and the conduct of the hearing accomplished in the same manner as provided in Minn. Stat. § 103G.311, subds. 2, 6, and 7. Minn. Stat. § 103G.311, subd. 2, in turn provides that the hearing be made under the provisions of Minn. Stat. § 14.57 to 14.59, the provisions governing contested case proccedings under the Administrative Procedure Act. After the hearing, the Commissioner shall either certify approval of the proposed action or deny it. The decision shall be based upon findings of fact made on substantial evidence found in the hearing record.[125]

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[120] *See* Lakeland Ordinance § 302.031 (provisions of the Model Ordinance are in addition to and not in replacement of the provisions of the Zoning Ordinance. Any provisions of the Zoning Ordinance relating to the Lower St. Croix Riverway shall remain in full force and effect except as they may be contrary to the provisions of this Model Ordinance.)

[121] Minn. Stat. § 462.357, subd. 6(2).

[122] *See, e.g., Merriam Park Community Council, Inc. v. McDonough*, 210 N.W.2d 416, 419 (Minn. 1973), *overruled on other grounds, Northwest College v. City of Arden Hills*, 281 N.W.2d 865 (Minn. 1979) (review is to determine whether the decision-maker acted within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination); *Van Landschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983); *Rowell v. Board of Adjustment*, 446 N.W.2d 917 (Minn. App. 1989); *Sagstetter v. City of St. Paul*, 529 N.W.2d 488 (Minn. App. 1995).

[123] Minn. R. 6105.0540, subp. 3 B. & C.

[124] *Id*., subp. 2.

[125] *Id*., subp. 3 E.

The DNR contends that it carefully weighs the decisions of local governments and that it will certify approval of a variance, despite inadequate findings by the local government, if its independent review shows that certification of approval is justified.[126] In any event, because the Administrative Law Judge has concluded that the DNR had authority to adopt the certification process provided in Minn. R. 6105.0540, the above provisions require that a contested case hearing be conducted, that the ALJ make a recommendation to the Commissioner based on all the evidence in the record, and that the Commissioner make the decision to certify approval or deny the variance issued by the City based on substantial evidence contained in the record of the contested case. The City's arguments to the contrary are misplaced.

Hubbard makes the related argument that the DNR failed to consider case law developed under the Municipal Planning Act suggesting that the hardship standards for granting variances to dimensional (or area) ordinances should be interpreted less stringently than hardship standards for granting variances for use ordinances. The case law developed under the Municipal Planning Act does draw a distinction between variances granted to dimensional ordinances and those granted to use ordinances.[127] It is not at all clear, however, that this distinction properly would be drawn here, where there are independent federal and state statutes protecting wild and scenic rivers and the DNR has the authority to ensure that its rules are not nullified by unjustified exceptions in particular cases and to promote uniformity in the administration of St. Croix Riverway ordinances by all municipalities on the Lower St. Croix River.

Furthermore, the purposes of the statutes and ordinances at issue here are different than those typically associated with the protection of the public health, safety, and welfare under the Minnesota Municipal Planning Act. The general intent and purpose of the Wild and Scenic River Act is to retain the outstanding scenic, recreational, natural, historical, and scientific value of the river and to preserve and protect it for present and future generations.[128] The general intent and purpose of the Lower St. Croix Wild and Scenic River Act, in particular, is to preserve this unique scenic and recreational asset lying close to the largest densely populated area of the state through the development of guidelines and standards; and even more specifically, through the development of standards that are intended to protect riverway lands by means of setback requirements on development.[129] The specific intent and purpose of the bluffline setback rule is to protect riverway lands with the specific objectives to maintain the aesthetic integrity of the Saint Croix Riverway's dominant natural setting, to reduce the adverse effects of poorly planned shoreland and bluffland development, to provide sufficient space on lots for sanitary facilities, to minimize flood damage, to prevent pollution of surface and ground water, to minimize soil

[126] Tr. 342-44.
[127] *See Kismet Investors, Inc., v. County of Benton*, 617 N.W.2d 85, 88 (Minn. App. 2000).
[128] Minn. Stat. § 103F.305.
[129] Minn. Stat. § 103F.351, subds. 2 & 4.

erosion, and to provide a natural buffer between the river and developed areas.[130] The purpose of the certification rule, as noted above, is to ensure that local governments do not nullify these standards by making unjustified variance decisions and to ensure uniformity in the administration of the Act.

The City of Lakeland is subject to the Municipal Planning Act, and the case law developed thereunder certainly establishes the principle that variance decisions, whether based strictly on the words of the local ordinance or on the provisions of Minn. Stat. § 462.357, subd. 6, are to be made "in harmony with the general intent and purpose of the zoning code where there are practical difficulties or peculiar hardships in the way of carrying out the strict letter of its provisions, so that the public health, safety, and general welfare may be secured and substantial justice may be done."[131] This is not a substantively different standard than that required under the DNR rules. Other than that, it is difficult to apply the specifics of any of the case law cited by Hubbard to the facts of this matter, because the procedural posture is different, the scope of review is different, and the spirit and intent of the statutes and ordinances at issue are different.[132]

**Amendments to Municipal Planning Act**

Hubbard also contends that the DNR failed to give effect to the 2004 amendments to the Municipal Planning Act that gave landowners greater freedom to replace nonconforming structures. Under those amendments, Hubbard maintains that no bluffline setback variance should have been required at all. The Municipal Planning Act, as noted above, was enacted in 1965. In 2001, a section permitting the continuance of nonconformities was added.[133] In 2002, a section concerning substandard structures, as defined in DNR rules, was added. It provides that "Notwithstanding subdivision 1e, Minnesota Rules, parts 6105.0351 to 6105.0550, may allow for the continuation and improvement of substandard structures, as defined in Minnesota Rules, part 6105.0354, subpart 30, in the Lower Saint Croix National Scenic Riverway."[134] This section clearly

[130] Minn. R. 6105.0380, subp. 1.
[131] *Merriam Park Community Council*, 210 N.W.2d at 420.
[132] In *Rowell*, 446 N.W.2d at 922, for example, a church sought a variance to a setback requirement in order to build an addition. The church was not a substandard structure, and there were no ordinances requiring replacement behind the setback. The Court held the local authority properly issued the variance on the basis of undue hardship. *See also Merriam Park,* 210 N.W.2d at 420 (affirming grant of variance to setback requirement; proposed structure was consistent with city's comprehensive development plan); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. App. 2002) (affirming denial of a variance to a height restriction on garages); *Nolan v. City of Eden Prairie*, 610 N.W.2d 697 (Minn. App. 2000) (affirming grant of variance to preliminary plat requirement); *Sagstetter v. City of St. Paul*, 529 N.W.2d 488 (Minn. App. 1995) (affirming variance to height requirement for a domed ballfield in an area in which the ballfield was a permitted use).
[133] Minn Laws 2001 ch. 174, § 1; Minn. Stat. § 462.357, subd. 1e.
[134] Minn. Laws 2002 ch. 366, § 6;

permits the DNR to enforce its more protective rules concerning substandard structures, regardless of the provisions of Minn. Stat. § 462.357, subd. 1e.

In 2004, the section concerning nonconformities was changed as follows:

> Any nonconformity, including the lawful use or occupation of land or premises existing at the time of an adoption of an additional control *under this chapter*, may be continued, including through repair ~~or~~, replacement, restoration, maintenance, ~~but if~~ or improvement, but not including expansion, unless: (1) the nonconformity or occupancy is discontinued for a period of more than one year~~,~~; or (2) any nonconforming use is destroyed by fire or other peril to the extent greater than 50 percent of its market value, and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a building permit in order to mitigate any newly created impact on adjacent property. Any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy. A municipality may, by ordinance, permit an expansion or impose upon nonconformities reasonable regulations to prevent and abate nuisances and to protect the public health, welfare, or safety. This subdivision does not prohibit a municipality from enforcing an ordinance that applies to adults-only bookstores, adults-only theaters, or similar adults-only business, as defined by ordinance.[135]

The purpose of this change is to permit the continuance, repair, replacement, restoration, maintenance, or improvement (not including expansion) of a lawful use or occupation of land or premises *existing at the time of an adoption of an additional control under Minn. Stat. § 462.357.* The legislative history pertaining to this amendment suggests it was intended to address the rights of business owners to replace, restore, or improve nonconforming uses that are damaged by fire or other peril.[136] The statute distinguishes between nonconforming uses under section 462.357, subd. 6, and substandard structures as defined by the DNR, and it does not by its terms conflict with the Wild and Scenic River Act or the Lower St. Croix Wild and Scenic River Act. Nor does it invalidate the DNR rules specifically referenced in § 462.357, subd. 1f, which contain their own grandfathering provisions allowing continued use of substandard structures, or any of the ordinances adopted by municipalities up

[135] 2004 Minn. Laws ch. 258, § 2 (emphasis added). Similar changes were made to Minn. Stat. § 394.36, the statute applicable to counties. *See* 2006 Minn. Laws ch. 270, art. I, § 5.
[136] Affidavit of Rita M. Desmond (attached to DNR's Prehearing Memorandum, Mar. 27, 2007).

and down the Lower St. Croix River that require variances to replace structures in the bluffline setback area.[137]

**Burden of Proof**

The parties also dispute who has the burden of proof in this case. Hubbard and the City contend that the DNR has the burden of proving the facts at issue by a preponderance of the evidence; the DNR and the intervenors argue that Hubbard, as the applicant for a variance, has the burden of proof. Under Minn. R. 1400.7300, subp. 5, the party proposing that certain action be taken has the burden of proving the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard. The courts have placed a "heavy burden" on an applicant for a variance to show that its grant is appropriate under the controlling ordinance.[138] Accordingly, Hubbard has the burden of proving that the grant of a variance to the bluffline setback requirement would be appropriate under the Wild and Scenic Rivers Act, the Lower St. Croix Wild and Scenic River Act, and Minn. R. 6105.0520.[139]

**Demonstration of Hardship**

The Lakeland Ordinance and DNR rule require that if substandard structures are replaced because they have deteriorated or become obsolete, they must be replaced behind the bluffline setback unless hardship is demonstrated. Both require some initial showing that there are particular hardships that make strict enforcement of the ordinance impractical, whether the difficulty is due to physical obstructions, legal easements, placement of septic systems, constrictions due to lot size or shape, or other practical obstacle. Hubbard offered the argument, which was accepted by the City, that he had demonstrated hardship because the existing structure had to be "dealt with" and that his plan would eliminate the unattractive aspects of the old structure, permit stabilization of the bluffline, permit measures to control erosion, and result in a "net gain" for him and for the City of Lakeland. None of these arguments is particularly relevant to the definition of hardship contained in the Lakeland Ordinance or the DNR rule.

The City made no finding that there were particular hardships that made strict enforcement of the ordinance impractical; rather, the City found "The lot can support single family residential development and the proposed development is fundamentally reasonable." There is no dispute that a single-family residence of

[137] Even if it did conflict, however, the Wild and Scenic River Act, Minn. Stat. § 103F.345, provides that "in the case of conflict with some other law of this state the more protective provision shall apply."

[138] *See In re Application of the City of White Bear Lake*, 247 N.W.2d 901 (Minn. 1976); *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980); *Van Landschoot v. City of Mendota Heights*, 336 N.W.2d at 509.

[139] Regardless of who has the burden of proof, this is not a case in which assignment of the burden of proof is dispositive. The DNR demonstrated by compelling evidence that the Commissioner properly denied certification in this case.

almost any imaginable size could be established on Hubbard's property in full compliance with the bluffline setback rule.

The City's second finding in support of hardship was that "Lot impervious surface requirements are met by the development as proposed." Hubbard's project must meet impervious surface requirements, regardless of where on the lot the house is situated.[140] His obligation to meet these requirements does not support a finding of hardship.

Third, the City found that "The existing grade and topography of the lot can be adjusted under the supervision and direction of the City Engineer, as part of this development to better conform to the ordinance requirement for the St.Croix River District overlay ordinance. The City Engineer and the City Clerk will ensure compliance with the City Code of Ordinances. Violation of City Ordinances will be grounds for stoppage of the development." Again, these are all statements that would be true regardless of where on the lot the house is situated. They do not provide a legal basis for finding hardship that would justify a bluffline setback variance.

Fourth, the City found that "The lot has multiple grades and bluff lines to contend with from a development standpoint and is unique in its topography and layout affecting building [siting] and location." The lot does have multiple grades *at the bluffline*, but is otherwise almost completely flat. The proposed house, which is about 130 feet wide, could be built larger, taller, and wider behind the setback area, and neither the DNR nor the City would have anything to say about it. Furthermore, the record is clear that there is nothing unique about older homes situated on or below the bluffline along the Lower St. Croix River.

The City's fifth finding, that "The proposed development will allow the bluff line to be stabilized and improved upon from its existing state," would again be equally true regardless of where the house is situated. If the existing home were removed, Hubbard would be required to fill and stabilize the bluffline. He would not be permitted to leave a hole on the bluff that would quickly erode.[141] His obligation to comply with these requirements does not support a finding of hardship with regard to the bluffline setback.

The City's sixth finding, that "The development as proposed will be visually inconspicuous from the St. Croix River during summer months," would be relevant if Hubbard were proposing to remodel, instead of replace, the existing structure. This project is a proposed replacement of a substandard structure. If it were set behind the bluffline setback area, it would not matter how conspicuous it was. Furthermore, the evidence is inconclusive as to whether the proposed home would really be inconspicuous. Although Hubbard's photographic simulations depict it as virtually unnoticeable, the simulations are based on

[140] Tr. 143, 146, 307.
[141] Tr. 260, 297, 362.

photographs taken in the afternoon with dark shadows obscuring the area, and there was little solid testimony as to how the architect determined which trees would stay and which would be removed to build the home. The Sierra Club made a more diligent effort to actually examine and identify the areas where trees would have to be removed, but its evidence is limited to the opinion that the new house would be more conspicuous than the existing one. The DNR's evidence is based on the common-sense observation that a second story would show above the existing gap in the trees, but it has offered no other evidence as to how the remainder of the proposed home would look from the river. No one has attempted to simulate the appearance of the bluff when additional trees are removed for construction of the landscape stairs and tram.

The City's seventh finding, that "The development as proposed does not increase the level of non-conformity with the ordinances relative to the existing structure," is both irrelevant and incorrect. It is irrelevant because DNR rules and Lakeland ordinances do not permit, in any instance, an increase in the extent to which a substandard structure violates a setback standard.[142] Hubbard's compliance with this rule could not demonstrate hardship. And the finding is incorrect because Hubbard's architect did not use the bluffline definition in the Lakeland Ordinance or the DNR rule; he instead tried to locate "the original bluff," because he did not think the result using the 12% slope rule made sense. This definition was not anywhere apparent on the drawings, and the City may not have been aware of it, but sufficient questions were raised that some further exploration of the issue should have occurred before a responsible decision on the application could be made. When the DNR-determined bluffline is used, the proposed project increases the amount of structure footprint in the setback area, and it is apparent that an additional variance for grading on slopes greater than 12% would be required. The City's seventh finding is both legally and factually unsupported.

This is an area in which many homes have been built at or below the bluffline and are considered substandard structures for that reason. The location of the existing deteriorated and obsolete structure is not a practical obstacle to compliance with the setback requirement. Hubbard's argument to the contrary reads hardship out of the ordinance. The record is clear that strict enforcement of the setback requirement presents no peculiar hardship to Hubbard that would require a variance so that substantial justice might be done, consistently with the purpose and intent of the statute and ordinance. The DNR properly refused to approve the City's decision to grant a variance to the bluffline setback requirement in this case.

Certification of approval of this variance, without requiring demonstration of some type of hardship making strict enforcement difficult or impractical, would make it difficult to deny certification to anyone who owns a substandard structure on the Lower St. Croix River and wishes to build a new home on the same

[142] Minn. R. 6105.0370, subp. 11 B.

footprint, as long as improvements to meet other requirements and to reduce existing damage to the bluff are promised. As the former mayor of Lakeland testified, "I would dare say today for anyone under the DNR rules using modern standards, it is somewhat of a hardship to improve that property in a way that befits the standards of most families today." Hardship is not established because modern families might wish to improve the property in a manner that is not consistent with the St. Croix Riverway ordinance; it is established when the owner demonstrates that compliance with the strict terms of the ordinance is impractical or difficult for reasons associated with circumstances unique to the property. A variance would be appropriate if, despite the practical difficulties associated with compliance, the owner's proposal were otherwise consistent with intent of the Act and the ordinance.

**Sierra Club/St. Croix River Association Arguments**

The Sierra Club and the St. Croix River Association have argued that the Commissioner should also deny certification of the variances granted for the sideyard setback and height restriction. The DNR has no rule on sideyard setback, and Hubbard's project complies with the DNR's rule concerning height restrictions.[143] The Commissioner properly declined to review those variances, and the City's decisions to grant them are final.[144]

The Sierra Club also argues that certification of the bluffline setback variance was properly denied because approval would be inconsistent with the the Minnesota Environmental Rights Act (MERA), Minn. Stat. § 116B.09, subd. 2. That statute provides that upon intervention by interested persons in an administrative proceeding in which it is alleged that the conduct at issue will impair the state's natural resources:

> the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

[143] Minn. R. 6105.0380, subp. 7 (the distance between the "average ground level and the uppermost point of the structure shall not exceed 35 feet"). The height of Hubbard's proposed home using "average ground level" does not exceed 35 feet, although the measurement of the lowest to the highest point on the structure is 42 feet.
[144] Tr. 291, 311-12.

It appears that the agency has already considered these factors in denying certification of the bluffline setback variance under its own rules. The DNR's decision is fully consistent with MERA.

K.D.S.